UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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DEWEY R. BOZELLA,

Plaintiff,

v. 10 Civ. 4917(CS)
Decision on Motions

THE COUNTY OF DUTCHESS,
THE CITY OF POUGHKEEPSIE,
and WILLIAM J. O'NEILL,

Defendants.

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White Plains, N.Y.
September 23, 2014
10:00 a.m.

Before:

THE HONORABLE CATHY SEIBEL,

District Judge

APPEARANCES

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THE DEPUTY CLERK: Bozella against County of Dutchess, et al.

THE COURT: All right. Good morning, everyone.

I'm prepared to rule on the motions for summary judgment, but if there's anything anybody wants to add that wasn't covered in the papers, now is your chance.

You have nothing?

MR. P.T. BURKE: Nothing.

MR. MacDONALD: Nothing to add to the papers, your Honor.

THE COURT: All right. Here we go, then.

I've got plaintiff's motion for partial summary judgment in his favor on a portion of his Monell claim against Defendant Dutchess County, and I have Defendant Dutchess County and O'Neill's motions for summary judgment dismissing the plaintiff's claims.

The parties are familiar with the details, so I'm just going to summarize the facts, which are undisputed, except where noted, and which come from the 56.1 statements and supporting documents.

The plaintiff was twice convicted in the 1977 murder of 92-year-old Emma Crapser in Poughkeepsie. The first conviction in 1983 was overturned on Batson grounds, and the plaintiff was retried and convicted again in 1991.

On October 14th, 2009, the Dutchess County Court

granted plaintiff's motion under New York Criminal Procedure Law, Section 440, to vacate the 1991 judgment of conviction, and he was released after more than 26 years in prison. The Dutchess County District Attorney or D.A. opposed the plaintiff's motion. At that time and at the time of plaintiff's 1991 conviction, the D. A. in Dutchess County was William Grady.

Over the D.A.'s objections, the County Court found four violations of plaintiff's constitutional rights under Brady, which are the same four violations underlying plaintiff's Monell claim against the County in this case. The Court found that the D.A. had failed to disclose four kinds of Brady evidence.

First are what I'll be calling the "neighbors' statements," voluntary statements of Cecil Carpenter, Curtis Carpenter, Shirley Ellerby and Linda Miller, who were in and out of the upstairs apartment all night, and claimed they did not hear or see anything unusual in front of the victim's building on the night of the murder. Those statements contradicted testimony offered by the State that placed plaintiff and prosecution witness Lamar Smith in front of the building. I'm also including in this category the statement of Cynthia Murphy who sat on a park bench near the front of the building all evening, and said that she did not see plaintiff or the prosecution witness, Lamar Smith, who she knew and who

said he was there. There was also a statement of someone named Diedra Walker who was visiting the upstairs apartment. The Dutchess County Court did not discuss this statement, but it was mentioned in the police report which is referred to as the "Shelly Report," which I'll discuss more in a few minutes.

The second undisclosed Brady material was what I'll call the "alleyway neighbor's statement." This was a statement from a neighbor reporting that she heard loud noises in the alley next to the victim's apartment on the night of the murder. The statement was made to a Detective Murphy who did not write it down, but mentioned it to Officer Arthur Regula, who did write a report, but which did not include the alleyway neighbor's statement. The statement supported plaintiff's theory that Donald Wise, not the plaintiff, was the killer, and that Donald Wise gained access to the home through the alley window, a theory that was bolstered by Mr. Wise's fingerprint on the inside of that window and information from a witness to whom Mr. Wise had spoken. But there was also contrary evidence that access was not through the window, given that a lot of dust and debris around the window was undisturbed.

But that was the second species of Brady evidence that the County Court found should have been turned over.

The third was what we're calling the "Holland Tape." It was a recording of an interrogation on February 23rd, 1978, of a man named Saul Holland in connection with what we're

calling the "King murder," which was a break-in at an apartment of some elderly sisters, one of whom died in the manner similar to Ms. Crapser. In the Holland Tape, Holland says that, first of all, he and Donald Wise, among others, were responsible for the King murders, and Holland said that Donald Wise told Holland that he had done one of these jobs before; specifically, a burglary where, quote, "the lady came home," unquote, which supported plaintiff's theory that Wise did the Crapser murder, because that was a murder which started as a burglary and where Ms. Crapser came home during the burglary. The interrogating detective seems to prompt Mr. Holland to mention this story on the tape, but then somewhat abruptly tells Holland that he doesn't want to get into it, "because we're liable to get confused." And the County Court found that that statement by Mr. Holland that Mr. Wise had done a burglary before where the lady came home supported plaintiff's theory that Wise was the killer.

And finally, the fourth item was what we're calling the "Dobler Report." It was a report describing the 1977 assault of an elderly woman named Estelle Dobler which shared similarities with the Crapser and King murders, and in which Ms. Dobler's description of her attacker was consistent with Donald Wise. And that report, the Court also held, should have been turned over.

The District Attorney did not appeal the County

Court's 440 decision, and Mr. Bozella was released.

On June 24th, 2010, plaintiff commenced this action by filing a complaint against Dutchess County, the City of Poughkeepsie, Assistant D.A. or A.D.A. William O'Neill and Officer DeMattio. DeMattio, O'Neill and the County moved to dismiss, and the City moved for judgment on the pleadings.

On September 29th, 2011, I granted in part and denied in part O'Neill's motions, and I granted the motions of the County, City and DeMattio. I also denied plaintiff leave to amend.

At that point, the only claim that remained was the claim against O'Neill for the alleged coercion of a witness named Madelyn Dixon South who had implicated Wise, then recanted that testimony in front of the grand jury, and then implicated Wise again at plaintiff's 1983 trial. And her testimony was read to the jury at the 1991 trial.

Plaintiff alleged that O'Neill had coerced South into falsely recanting in front of the grand jury previous statements she had made implicating Wise in the murder, and that O'Neill had done so in order to secure plaintiff's indictment.

Plaintiff sought reconsideration of my decision denying leave to amend, and on January 6th, 2012, I granted reconsideration, and, on reconsideration, granted plaintiff leave to amend a Monell claim against the County for its

alleged policy of not disclosing Brady evidence unless it was, quote, "truly exculpatory," unquote. The amended complaint was filed on January 31st, 2012, and answered on April 9th. Discovery took place. We had a pre-motion conference on March 5th, 2013, and set a briefing schedule for the instant motions which I am now about to decide.

They are motions for summary judgment. I won't take the time to recite the legal standards. We're all familiar with them.

Before I get to the Monell claim, let me first turn to plaintiff's claim against A.D.A. O'Neill, who is now retired.

The defendants argue that O'Neill is entitled to summary judgment because he acted in a prosecutorial role when soliciting grand jury testimony from South, and thus, he is entitled to absolute and qualified immunity. Defendants add that South was clearly confused about which Assistant District Attorney had coerced her, so that there is insufficient evidence to maintain a claim against Defendant O'Neill.

There are two A.D.A. O'Neills. There is William O'Neill, with two "L"s, and Jim O'Neil with one "L," who, I was sorry to learn, had passed away. And they were both involved in the Crapser case. But it was Jim O'Neil who actually questioned South before the grand jury. The allegation here is that William O'Neill spoke to South before her grand jury testimony, and somehow coerced her into recanting the statement

she had previously made implicating Wise. Plaintiff responds that O'Neill is not entitled to immunity, or at least that there is a question of fact on the subject.

There is sort of a preliminary matter floating around, which is whether South's testimony to the effect that she was coerced into changing her story in front of the grand jury would be admissible at a trial of this case. South died after plaintiff's first trial, and the transcript of her testimony was admitted at plaintiff's second trial. But it doesn't follow from that that it's necessarily admissible now in a 1983 claim against O'Neill personally.

The burden is on plaintiff as proponent to establish by a preponderance of the evidence that the testimony is admissible. See O'Brien v. City of Yonkers, 2013 Westlaw 1234966, at Page 7 (S.D.N.Y. May 28th, 2008). Testimony of a nonparty witness that was given at a prior hearing is hearsay when offered for its truth. See generally evidence Rule 801(c). Evidence Rule 804(b)(1) exempts prior testimony given by an unavailable witness from the hearsay rule if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross- or redirect examination. That's Evidence Rule (b)(1)(B). See Paterson v. County of Oneida, 375 F.3d 206, at 219 to 20. It is undoubtedly under the state analogue of this rule that the testimony was admitted at the second

trial. But again, it doesn't necessarily mean it should be admitted in the civil case.

In discussing the "similar motive" requirement, the Second Circuit has explained that the test must turn not only on whether the questioner is on the same side of the same issue at both proceedings, but also on whether the questioner had a substantially similar interest in asserting that side of the issue. U.S. v. DiNapoli, 8 F.3d 909, at 912. See U.S. v. Whitman, 555 Fed. Appendix 98, at 103.

I'm not at all sure that O'Neill had the same motive to cross-examine South in the 1983 trial as he has now when the testimony is being offered against him personally. Arguably, O'Neill's interest is greater now because he is subject to personal attack and personal liability. As the DiNapoli Court at Page 915 said, the, quote, "nature of . . . what is at stake," unquote, is relevant in determining similarity of motive. It's possible O'Neill didn't feel it was necessary to vigorously cross-examine South on the claim that he had coerced her into changing her story. Maybe he thought the fact that she had changed her story was enough to convince a jury she was not to be believed, whatever her testimony. And she certainly had other credibility issues, and he may have concluded that her testimony did not pose a danger to the case. See Hannah v. City of Overland, 795 F.2d 1385, at 1390 to 91 (8th Cir. 1986). See also O'Brien at Page 8, where the Court collects cases on

why a prosecutor may have a different motive as a defendant in a civil case than he did as a prosecutor in a criminal case.

On the other hand, O'Neill did cross-examine South on her claim that he had coerced her into changing her story. He asked whether it was him or Jim O'Neil who had coerced her, and through his questioning, it became apparent that South was confused about the identity of the two men. So even though O'Neill wasn't personally targeted at the trial, he did take the time to attack South's testimony. But I still don't know that plaintiff has met his burden of showing that O'Neill had the same motive to cross-examine South.

But ultimately, I need not resolve this question, because the plaintiff's claim against O'Neill fails for a far simpler reason. The undisputed facts reveal that it was impossible for O'Neill's alleged coercion of South to have secured plaintiff's indictment. Plaintiff was indicted before O'Neill allegedly coerced South into changing her grand jury testimony. So any coercion could not have had an effect on plaintiff's indictment.

It's undisputed that plaintiff was indicted on March 31st, 1983. It's also undisputed that South testified before the grand jury on April 14th, 1983, 14 days later. It was at this grand jury, which apparently was looking into charges against Mr. Pitman, that South recanted her testimony, allegedly based on O'Neill's coercion. It's chronologically

impossible for O'Neill's coercion of South to have had any effect on securing plaintiff's indictment.

The alleged coercion may have had an effect on plaintiff's conviction, but plaintiff has not pursued this argument. The inconsistency in South's statements, between her grand jury testimony when she recanted her previous statement that Wise had confessed to the murder, and her testimony at plaintiff's trial that Wise had confessed to the murder, arguably casts doubt on the truthfulness of her testimony, and so diluted the power of defendant's defense. In other words, the jury may have been less likely to believe South that Wise had confessed to the murder when it learned that she had previously testified otherwise. But plaintiff has not alleged that the coercion of South led to plaintiff's conviction. The claim is that O'Neill coerced South's testimony to, quote, "secure . . . the indictment" -- that's Paragraph 215 of the amended complaint and Paragraph 99 -- which is chronologically impossible.

Likewise, on the issue of immunity, that plaintiff was already indicted and therefore, by definition, there was probable cause to charge him before the alleged coercion took place, is a significant factor suggesting that O'Neill is entitled to absolute immunity. Cousin v. Small, 325 F.3d 627, at 633 (5th Cir. 2003). See Descovic v. City of Peekskill, 2009 Westlaw 2475001, at Page 13 (S.D.N.Y. August 13th, 2009).

Given the time line, it seems that O'Neill pressuring South to recant her testimony implicating Wise, if it happened, was not to secure probable cause, but to bolster an already assembled case. Under Hill v. City of New York, 45 F.3d 653, at 662, quote, "Out-of-court efforts to control a witness's grand jury testimony that are made subsequent to the decision to indict," unquote, are protected by absolute immunity.

Here, contrary to what I thought at the time of the motion to dismiss, not only had the decision to indict already been made, but the indictment had, in fact, already been voted. I said in my decision on the motion to dismiss, based on the allegations in the complaint, that it was plausible that O'Neill coerced South's testimony to establish probable cause, rather than to bolster evidence against an already indicted individual. As the evidence has played out, the opposite is true.

In sum, whether on grounds of absolute immunity or absence of causation, O'Neill is entitled to summary judgment dismissing plaintiff's claims against him.

Let me now quickly mention the claim for punitive damages before sinking my teeth into the Monell claim.

Punitive damages are not recoverable against the County. That's well settled. City of Newport v. Fact Concerts, 453 U.S. 247, at 271, and Parkash v. Town of Southeast, 2011 Westlaw 5142669, at Page 10 (S.D.N.Y.

September 30th, 2011). So the claim for punitive damages goes away along with the claim against O'Neill. Obviously, the plaintiff can seek compensatory damages against the County, and I imagine they would be substantial.

So now, let me address whether the Monell claim survives.

And first, let me address the plaintiff's motion.

The plaintiff seeks partial summary judgment on the first element of the Monell claim asserting two theories: One, that the County is collaterally estopped from relitigating the County Court's finding that the Brady evidence was favorable, material and undisclosed; and second, even if collateral estoppel does not apply, plaintiff is entitled to partial summary judgment, because's the County does not dispute that three of the four pieces of Brady evidence were undisclosed, and the undisputed record establishes the favorability and materiality of that evidence.

The County opposes the motion, and seeks summary judgment dismissing plaintiff's claim.

First, let me talk about collateral estoppel or issue preclusion which prevents parties or their privies from relitigating in a subsequent action an issue of fact or law that was fully and fairly litigated in the prior proceeding. Marvel Characters v. Simon, 310 F.3d 280, at 288. The same case tells us that under New York law, collateral estoppel

applies when the identical issue was raised in a previous proceeding, the issue was actually litigated and decided in the previous proceeding, the party had a full and fair opportunity to litigate the issue, and the resolution of the issue was necessary to support a valid and final judgment on the merits.

I'll talk first about the identity of issues.

The burden of showing that an issue raised in the subsequent proceeding is identical to one that was raised and necessarily decided in the prior action rests squarely on the party moving for preclusion. Sullivan v. Gagnier, 225 F.3d 161, at 166. See Peterson v. City of New York, 2012 Westlaw 2148181, at Page 1 (S.D.N.Y. June 13th, 2012). So the burden is on the plaintiff on the "identical issue" issue.

Plaintiff argues that the issue decided by the Court was that plaintiff's rights under Brady were violated by the failure to disclose the Brady evidence, and that the same issue exists in this case. The County responds that the issues are different. It argues that while the County Court determined that four categories of evidence were Brady material that should have been turned over but were not, the issue in this case is whether the County had an unconstitutional policy of suppressing Brady evidence unless it was truly exculpatory.

The County overlooks that plaintiff is not seeking summary judgment on his entire Monell claim. Plaintiff seeks only partial summary judgment on the existence of a

constitutional violation, which is only one part of the three-part Monell inquiry. See Wray v. City of New York, 490 F.3d 189, at 195, where the Court said, "To hold the City liable under Section 1983 for the unconstitutional actions of its employees, a plaintiff is required to plead and prove three elements: An official policy or custom that causes the plaintiff to be subjected to a denial of a constitutional right."

Actually, the way it's worded is that "A plaintiff is required to plead and prove three elements: (1) an official policy or custom that (2) causes the plaintiff to be subjected to (3) a denial of a constitutional right."

Plaintiff seeks summary judgment on the third element only, not on the first two.

But I also need to address the standard of proof.

Courts and commentators alike have recognized that a shift or change in the burden of proof can render the issues in two different proceedings nonidentical, and thereby make collateral estoppel inappropriate. Cobb v. Pozzi, 363 F.3d 89, at 113, collecting cases. "To apply issue preclusion when the burden of proof is heavier in the second litigation would be to hold, in effect, that the losing party in the first action would also have lost had a significantly different burden been imposed." That's Comment F to Section 28 of the restatement second of judgments. The same principle applies within the

context of civil actions. See Cobb, at 114, where the Court said, "The differences in gradations of civil standards of proof are more subtle than the shift from the 'reasonable doubt' standard to the preponderance standard, but the same basic principle continues to apply."

The County Court applied a lower standard of proof for its Brady analysis than I must apply here. Under Brady, the government must disclose material evidence favorable to a criminal defendant. U.S. v. Mahaffy, 693 F.3d 113, at 127. Undisclosed evidence is material if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. Youngblood v. West Virginia, 547 U.S. 867, at 870.

New York State courts, however, utilize a two-tier standard when assessing the materiality of nondisclosed favorable evidence. Where a defendant makes a specific request for a document, the materiality element is established, provided there exists a reasonable possibility that it would have changed the result of the proceedings. Absent a specific request, materiality can only be demonstrated by showing that there is a reasonable probability that it would have changed the outcome of the case. People v. Fuentes, 12 N.Y.3d 259, at 263.

The County Court decided plaintiff's 440 motion under the "reasonable possibility" standard. This seems to have been

a mistake, although not one that prompted the D.A. to appeal. Plaintiff had made a general demand for Brady evidence. So it looks to me that the County Court should have applied the higher standard of reasonable probability, but instead applied the lower standard of reasonable possibility. The higher "reasonable probability" standard applies to plaintiff's claim in this case. Because the standard of proof is higher now, defendants are not collaterally estopped from challenging the finding that plaintiff's Brady rights were violated.

I note parenthetically that the County argues that the County Court's error means that I should disregard the whole of the County Court decision, but I disagree. The decision to use the lower standard only prevents me from finding that the identical issue was previously decided with respect to materiality.

Plaintiff argues that even though the Court applied the lower "reasonable possibility" standard, it unquestionably determined that the evidence was material under the higher "reasonable probability" standard. Plaintiff cites language from the County Court decision that the Court was, quote, "firmly and soundly convinced of the meritorious nature of the defendant's application," unquote, and that the, quote, "legal and factual arguments advanced in support of the motion are compelling; indeed, overwhelming." Unquote.

But this argument does not follow. Just because the

Court used strong language in deciding that Brady had clearly been violated under the standard the Court found applicable does not mean the Court would have found that the higher standard was met on these facts.

Plaintiff next argues that in the event I agree with the County that collateral estoppel should not apply because the materiality standard in this case differs from the standard the Court applied, such a decision would only preclude collateral estoppel on materiality, but would not preclude collateral estoppel on the issues of nondisclosure or favorability. This is probably so presuming that the County had a full and fair opportunity to litigate the Brady issue.

The burden is on the County to demonstrate that it lacked a full and fair opportunity to litigate. See Colon v. Coughlin, 58 F.3d 865, at 869. As an initial matter, I reject the County's seeming suggestion that collateral estoppel does not apply because the County Court never determined that the County had a full and fair opportunity to litigate. There would have been no occasion for the County to address that issue. It's a question for me to decide. See, for example, Colon at 869.

The parties agree that the County was not a party to the plaintiff's 440 motion, but disagree regarding whether the County was in privity with the opposing party to the 440 motion.

Plaintiff argues that the County was in privity, because even though the State is the party, the People of the State of New York are the party, in the criminal case, the D.A.'s Office was representing the State, and the County was in privity with the D.A.'s office which handled the 440 motion, and thus, the County should be bound by that decision. Plaintiff adds that District Attorney Grady, the policy-maker for the County, oversaw opposition to the motion, and that Grady had every incentive to defeat the motion.

The County disagrees, arguing that numerous cases have held that the D.A. is not in privity with the County, that the D.A.'s Office represented the state, not the County, as it does in every criminal prosecution, including the 440 motion, and thus, that the County lacked a full and fair opportunity to litigate the issue. The County cites numerous cases which suggest that the D.A. is not in privity with the County. Those cases include Jenkins v. City of New York, 478 F.3d 76, where the circuit held there was no privity between the municipality and the District Attorney in the false arrest case; Brown v. City of New York, 60 N.Y.2d 987, where the New York Court of Appeals held the same; and Wiltshire v. Williams, 2013 Westlaw 3192137, at Page 3 (S.D.N.Y. June 24th, 2013), which cited Jenkins and Brown, and explained that there was no privity in that case, because the defendant officer and the City were not parties to the underlying criminal action, and therefore did

not have an opportunity to argue the legal issue in the case. The County cites other cases which are similar: DeGennaro v. Town of Riverhead, 836 F.Supp. 109, at 112 (E.D.N.Y. 1993); Taveras v. City of New York, 635 N.Y.S.2d 608 (App. Div. 1995); and Saccoccio v. Lange, 599 N.Y.S.2d 306 (App. Div. 1993).

These cases involve situations that are admittedly different from this case, in that there, individuals were arrested for a crime, and the Criminal Court determined that probable cause was lacking. The individuals then sued the police for false arrest, and the Court concluded that the previous determination that the arrest was unlawful did not bar the municipality or the police from contesting the issue of probable cause, because the officer and, in turn, the municipality had no involvement in, or control over, the prosecution; the officer in the criminal case was merely a witness to the underlying events.

Here, as plaintiff argues, District Attorney Grady was involved in opposing the plaintiff's motion. Plaintiff has introduced evidence that Grady reviewed the motion, assigned it to A.D.A. Ed Whitesell, one of his top prosecutors; made sure that his office conducted a full investigation; and frequently conferred with Whitesell. Plaintiff adds that not only did Grady have the opportunity to litigate the motion, but he had every incentive to win, because plaintiff was arguing that the D.A. had violated his constitutional rights, and Grady was the

D.A. at the time of plaintiff's 1991 conviction. So Grady was, in effect, defending his own conduct and reputation.

The County disputes some of plaintiff's assertions regarding Grady's involvement. Without getting into those disputes, which are largely irrelevant for present purposes, it's undisputed that Grady was significantly more involved in this case than the officers were in the cases cited by defendants. So those cases -- Brown, Jenkins, et cetera -- do not compel my decision.

But nor do I think that the cases that plaintiff cites on Page 6 of his memo drive the decision, either. Those cases found privity existing between separate governmental entities, but involved governmental entities at the same level of government; for example, the D.A.'s Offices of Queens and Manhattan, or the D.A.'s Office and the Parole Office. None involved a situation like this one where a Court is being asked to find that a county is in privity with the District Attorney. Indeed, New York courts have largely refused to find two functionally independent governmental entities in privity with each other for purposes of preclusion. City of New York v. Beretta U.S.A., 315 F.Supp.2d 256, at 267 (E.D.N.Y. 2004).

The County of Dutchess and the District Attorney's Office are, if nothing else, functionally independent. Their functions and responsibilities are sufficiently distinct that preclusion would interfere with the proper allocation of

authority between them -- Beretta at 267 -- even if Grady is legally regarded as a County policy-maker for certain purposes under Section 1983.

I recognize some logic to plaintiff's argument that the County is collaterally estopped from challenging the Brady findings, at least where the underlying conduct at issue in the criminal proceeding was that of the same policy-maker whose acts are attributable to the County, and that person controlled the criminal litigation, and thus had a full and fair opportunity to litigate.

But the law, as I read it, doesn't suggest that the County is in privity with the D.A. for purposes of challenging findings from the criminal case. At a minimum, I am unable to find another court to have reached such a conclusion, and I hesitate to be the first to go out on a limb on this important issue. And the precedent is clear that the D.A. represents the State, not the County, during criminal proceedings. See Jackson v. County of Nassau, 2009 Westlaw 393640, at Page 4 (E.D.N.Y. February 13th, 2009).

So even if, as plaintiff argues, Grady had the same interest in defending against the 440 motion as the County has in this case, I don't think that's sufficient to take away the County's right to challenge the finding that Brady was violated.

I also take some issue with plaintiff's

characterization of Grady as a policy-maker. Grady may have been a County policy-maker when acting as manager of the D.A.'s Office. See Walker v. City of New York, 974 F.2d 293, at 301, where the circuit said where a D.A. acts as the manager of the District Attorney's Office, the District Attorney acts as a county policy-maker. But the D.A. is not a policy-maker when acting in a prosecutorial capacity, which he was doing when he defended against the 440 motion. See Jackson at Page 4. In other words, in litigating the 440 motion, Grady was exercising his role as prosecutor for the State of New York in an individual criminal case.

The conduct challenged in the instant case involves his managerial role in allegedly implementing an unconstitutional policy. So he wears different hats: One a State hat in the 440 litigation, and one a County hat here. And thus, the County should not be said to have had control over the 440 litigation.

In Doe v. City of Mount Vernon, 548 N.Y.S.2d, 282 (App. Div. 1989), the County of Westchester was sued for negligence in allowing child abuse victims to be victimized. Even though the Westchester D.A. in convicting the abusers had taken the position, and apparently proven beyond a reasonable doubt, that the abuse occurred, when plaintiffs in the civil case moved for partial summary judgment, apparently on the issue of whether the abuse had occurred, the Court said the

County was not barred by the previous criminal litigation handled by the D.A. In other words, the County could argue there had been no abuse, even where the D.A. had argued and proven that there had been abuse.

So it seems here that the County should be able to argue that there was no Brady violation where the D.A. had argued the same. Doe held that the County did not have the opportunity to participate in the criminal case, and the D.A. and the County did not have a sufficient relationship to warrant collateral estoppel. There is no reason to think the rule should be different just because the issue here was the conduct of the D.A.

Reasonable minds can differ on this one, but that's where I come out.

The County raised other reasons why I should not follow the County Court decision that there was no hearing as required under the C.P.L., and that the County Court didn't have the complete record of what was and was not disclosed, because neither side provided it to the County Court Judge. But because I find the County is not collaterally estopped, I need not reach these issues, although I don't find either argument particularly persuasive.

Even if collateral estoppel does not apply, plaintiff argues he is still entitled to summary judgment on the issues of nondisclosure, favorability and materiality of the Brady

evidence, because the facts with respect to those issues are undisputed. The County opposes the motion and cross-moves for summary judgment.

As an initial matter, the County argues that plaintiff can't, as a matter of law, obtain summary judgment on a single element of his Monell claim, because Rule 56 does not authorize a piecemeal adjudication of nondeterminative issues. See Member Services v. Securities Mutual Life, 2010 Westlaw 3907489, at Pages 16 to 17 (N.D.N.Y. September 30th, 2010). While some courts have disfavored motions for partial summary judgment -- see, for example, Melini v. 71st Lexington Corp., 2009 Westlaw 413608, at Page 3 (S.D.N.Y. February 13th, 2009) -- those same courts recognize that a court may, under Rule 56(d), narrow the issues for trial by determining that certain facts are undisputed when it would be practicable to save time and expense and to simplify the trial. That is Melini at Page 3.

That seems to me to be precisely what plaintiff is doing with his motion for partial summary judgment. Partial summary judgment motions are contemplated by the federal rules. The Rule 56 Advisory Committee notes state that "Partial summary judgment is merely a pretrial adjudication . . . that likewise serves the purpose of speeding up litigation by eliminating before trial matters wherein there is no genuine issue of fact." So I find it appropriate to consider the

motion for partial summary judgment.

The first issue is nondisclosure. Plaintiff argues there is no genuine issue of fact regarding that the Holland Tape, the Dobler Report and the alleyway statement were not disclosed. The County concedes that the Holland Tape and the Dobler Report were not disclosed, but argues that neither should have been turned over because they were not Brady material.

Putting aside the merits of that argument, it's irrelevant to the present inquiry. Whether or not it was Brady doesn't affect whether or not it was disclosed. Plaintiff is entitled to summary judgment on this narrow issue of disclosure with respect to the Holland Tape and the Dobler Report.

The County raises a similar argument with respect to the "alleyway witness" statement. It argues that I previously found that the statement was not Brady material. But that misrepresents my decision. I questioned whether the statement was Brady material. And what I said was, it is by no means obvious that a reasonable police officer hearing, as Regula did, four days after the neighbor's interview, that Smith placed plaintiff on the front porch entry to the victim's apartment, would recognize as helpful to the defense the neighbor's statement about the noise in the alley. Plaintiff entering the victim's apartment via the porch at one point and someone being in the alley at an unknown point are by no means

mutually exclusive. But I also said that I reach no definitive conclusion on the matter.

Further, and importantly, my comments were in the context of the now-dismissed claim against the City of Poughkeepsie regarding its alleged policy of failing to write down all eyewitness statements, and related to whether Officer Regula could reasonably have realized at the time that the statements were helpful or material. It was only in that context that I made any distinction between eyewitnesses and interviewees. That distinction, which pops up in the County's papers, is irrelevant for Brady purposes. In any event, my thoughts on whether or not the statement was Brady material do not affect whether or not the statement was disclosed, and there doesn't seem to be any dispute that it was not disclosed.

I could grant summary judgment in favor of plaintiff on the narrow issue of disclosure. I guess I am doing that, but as I will explain shortly, I have a separate issue with the alleyway statement.

Finally, the County asserts it's undisputed that the neighbor statements --

Let me back up.

Finally, in cross-moving for summary judgment, the County asserts that it's undisputed that the neighbor statements, including the Murphy statement, were disclosed. Plaintiff responds that disputed facts exist regarding whether

or not these statements were disclosed, and I agree. The County claims that the statements were disclosed in (1) the Shelly Report, (2) the June 14th, 1983, letter from Jim O'Neil, (3) William O'Neill's, quote, "Rosario notes," unquote, and in response to a subpoena issued by plaintiff's attorney, Mickey Steiman, in 1990. But none of those documents establish that the statements were, in fact, disclosed. Rather, this question remains very much in dispute.

For example, the County claims that Steiman received the Shelly Report, and that the neighbors' statements were attached to the report. But Steiman denies having received the purportedly attached statements, and the Bates numbering on the documents, as produced by the County, suggests that they were not together in the D.A.'s file.

Further, William O'Neill's Rosario notes is just a list of items that O'Neill claims to have turned over, but Steiman denies receiving any of these documents. Further, I note that the statement from Murphy, who was sitting outside on the park bench and says Lamar Smith was not there, is only mentioned in the Regula Report. So if that document was not turned over and there is a question of fact on that point, then the Murphy statement would not have been disclosed.

In the cases on which the defendants rely, the Court said the statements themselves did not have to be turned over where defense counsel was aware of the witness's identity. But

in those cases, defense counsel was also aware that the witness had or might well have favorable information. Indeed, in the Grossman and Volpe cases cited by the County, the government identified the witnesses as Brady witnesses, so the statements themselves did not have to be turned over. Here, in contrast, the witnesses were not only not characterized as Brady witnesses, but were arguably mischaracterized as irrelevant in the Shelly Report.

So disputed questions of fact prevent me from granting summary judgment to either party on the issue of disclosure.

I also reject the County's argument that it had no obligation to disclose these statements because the plaintiff should have discovered them independently. Largely for the reasons set forth in plaintiff's brief at Pages 16 to 17, I cannot say, as a matter of law, that plaintiff should have discovered this information. I don't think the summary in the Shelly Report was necessarily sufficient to give plaintiff's counsel the essential facts permitting him to take advantage of the exculpatory evidence, because the summary basically said these witnesses were irrelevant. Plaintiff's counsel would not have known from that statement that the witnesses, in fact, contradicted prosecution witnesses. And plaintiff's counsel, indeed, was arguably affirmatively misled in that regard.

Now, discussing favorability, plaintiff argues that the County can't demonstrate any genuine dispute of fact

regarding the favorability of the Brady evidence. Evidence is favorable under Brady if it's exculpatory or impeaching. U.S. v. Rivas, 377 F.3d 195, at 199. See U.S. v. Certified Environmental Services, 753 F.3d 72, at 91.

Plaintiff argues that the Holland Tape and the Dobler Report suggest that Donald Wise, not plaintiff, committed the Crapser murder. It's very hard to accept the County's argument that this evidence is unfavorable to plaintiff or that I can decide, as a matter of law, that it is unfavorable, when the evidence suggests another individual was responsible for the murder. The cases are legion that the existence of an alternative suspect is favorable to defendant and has to be disclosed. See Mendez v. Artuz, 2000 Westlaw 722613, at Page 13 (S.D.N.Y. June 6th, 2000) which collects many cases. That's a report and recommendation that was adopted at 2000 Westlaw 1154320 (S.D.N.Y. August 14th, 2000), which was affirmed at 303 F.3d 411.

To the contrary, not only do I not find that the evidence is unfavorable, I can go a step further and find the evidence is undisputedly favorable to plaintiff.

First, as to the Holland Tape, the County suggests it can't be favorable because it doesn't specifically refer to the Crapser murder, but that is not required. It refers to a crime with sufficient similarities to the Crapser murder, one where a lady came home as the burglary was in progress. Although the

City states that there were many unsolved burglaries in the City of Poughkeepsie in the relevant year, there is no evidence that there was any unsolved burglary in the City of Poughkeepsie that fit that description where the lady came home with the burglary in progress.

In the King murder, which involved breaking into the apartment of elderly women, tying them up and stuffing something down at least one woman's throat itself was sufficiently similar to the Crapser murder in which Ms. Crapser was tied up and something was stuffed down her throat, that Wise's participation in the former suggested his participation in the latter. Indeed, that the police and the press at the time saw a possible connection between the two murders based on modus operandi illustrates that evidence of Wise's participation in the King murder, coupled with his boast that he'd done one like it before, would have been favorable to plaintiff.

William O'Neill's testimony perfectly illustrates the problem. O'Neill testified that he did not regard the Holland Tape as favorable, because Holland could not have been talking about the Crapser murder because the authorities knew that plaintiff had done the Crapser murder. As I said, this perfectly illustrates the problem. Even if A.D.A. O'Neill, upon hearing that Mr. Holland was attributing to Mr. Wise a previous murder much like the Crapser murder, didn't decide

that the right thing to do for his own purposes was to revisit or reconsider the Crapser murder in light of that information, he still has an obligation to give the defendant that opportunity. Even if in the District Attorney's view the Holland Tape was not conclusive or not reliable, it is still favorable. Even if it did not undermine A.D.A. O'Neill's certainty that plaintiff was guilty, that is not his call to make. Evidence that might undermine a jury's certainty is favorable. "Favorable" does not mean that which the D.A. believes. It means that which could help the defendant. Even if the D.A. believes it's a lie, it can still be Brady material.

As the Mendez Court said, it is for the jury, not the prosecutor, to decide whether favorable information in the police record is credible. Otherwise, prosecutors might, on a claim that they thought it unreliable, refuse to produce any matter whatever helpful to the defense, thus setting Brady at nought. That's Mendez at Page 14. And the Court went on to collect cases to the effect that if evidence suggests someone else might have done the crime, it's favorable and has to be disclosed, even if the prosecution reasonably or not does not believe it's reliable.

Further, the evidence suggesting an alternative suspect could also have been used to impeach the credibility and reliability of the police investigation. See Kyles v.

Whitney, 514 U.S. 419 at 445. See also Alvarez v. Ercole, 2014 Westlaw 4056324, at Page 6, where the second circuit last month noted that it is a legitimate defense strategy to suggest that the police prematurely concluded the defendant was guilty and did an incomplete investigation. So I can hardly grant defendant summary judgment on favorability, and frankly don't see how anyone could rationally find the Holland Tape not to be favorable.

The same is true for the Dobler report. Someone fitting Wise's description fairly closely committed a rather similar offense right down to the cloth in the elderly lady's throat. Luckily, Ms. Dobler survived, but that's a fairly distinctive detail. Indeed, defense counsel's argument that evidence implicating Wise -- excuse me. County counsel's argument that evidence implicating Wise in the Dobler murder is not Brady material because the prosecution witness fingered plaintiff and not Wise -- that's in the brief at Page 24 -- again illustrates the problem. If that evidence undermined the prosecution's case in a significant way, it was Brady. That it contradicts the prosecution witnesses doesn't make it not Brady. That's why it is Brady.

The Holland Tapes and the Dobler report may not be conclusive of anything, but I do not see how a rational jury could fail to find them favorable.

I am unpersuaded by a case the County cites, Bohanan

v. United States, 821 F.Supp. 902 (S.D.N.Y. 1993), affirmed 19 F.3d 8. The Court there found that it was not Brady material that another group in a different state had a similar MO to the bank robbers who had been convicted. It reasoned that the existence of another group of bank robbers with a similar MO was irrelevant, because the prosecution had not relied on MO to establish the defendant's identity.

With all due respect to my counterpart in that case, that argument does not seem logical to me. Regardless of what evidence the prosecution offered to establish the defendant's participation, that someone else had the same MO would tend to suggest that the perpetrator may have been someone else. In other words, it would have undermined, maybe not conclusively, but it would have undermined the evidence that the prosecution had offered that it was the defendant. The Second Circuit's one-word affirmance sheds no light on its thinking, and more recently, it has acknowledged that evidence pointing to another possible suspect is favorable. See Mendez, 303 F.3d, at 411, and Alvarez at 6.

Even if I were to agree with Bohanan, the facts in that case are distinguishable from the instant case. The group of bank robbers with a similar MO in Bohanan were located in a different state than the defendant, but here, the evidence was that Wise had committed a similar crime in the same city.

In short, the suggestion that someone else who lived

in the area and who had committed similar crimes was responsible for the Crapser murder is indisputably favorable to plaintiff. The same is true for the "upstairs neighbor" statements. The County insists that the witnesses seeing nothing is neutral. But in this case, the witnesses seeing nothing is favorable because it contradicts the prosecution witnesses who described activity occurring where and when the neighbors saw nothing.

For example, Lamar Smith testified about all sorts of things he saw and heard outside the victim's building that night. Witness Murphy said she knew Lamar Smith, was in the vicinity all evening, and did not see him or the activity he described. This plainly impeaches the prosecution's witness. Statements that contradict the testimony of the People's witnesses are favorable to the plaintiff.

But I cannot say, as a matter of law, that the alleyway statement is favorable. Although the County Court found that it was, I continue to question whether the statement was Brady material for the reasons stated in connection with the motion to dismiss, and a jury could reach a different conclusion.

There is a separate problem with the alleyway statement, however. It's undisputed that this statement was never memorialized by the City of Poughkeepsie Police Department or shared with the District Attorney. Thus, its not

being handed over to plaintiff could not have been the result of the D.A.'s unduly restrictive definition of Brady. Assuming that the statement is favorable and material, the reason plaintiff never got it was because of an ad hoc decision by city police officers, not because the D.A. possessed it but withheld it pursuant to its overly narrow reading of Brady.

I previously held that there was nothing nefarious about the officer's decision not to write the statement down. But even if there were, the injury to plaintiff from not having the statement was not caused by any policy of the D.A.

So partial summary judgment should be entered for defendants as to that statement. Even though it was not disclosed, and even though there is a dispute of fact with respect to its favorability and materiality, I don't see how there can be any dispute that the injury to plaintiff, if any, was not caused by the D.A.'s custom or policy.

Causation is an element of plaintiff's 1983 claim -- see Wray, 490 F.3d at 195 -- and a reasonable jury could not find that element to be met. So summary judgment is appropriate for the County with respect to that statement only. I recognize that this wasn't really argued, and so when we're done here, I'll give the plaintiff the opportunity to persuade me otherwise, but it seems pretty clear.

Now, turning to materiality, plaintiff relies on the County Court decision to argue that the evidence was

undisputedly material. But for the same reasons the County is not collaterally estopped from challenging the Court's finding of a Brady violation, I cannot grant partial summary judgment on the issue of materiality. The decision involved the "reasonable possibility" standard, not the "reasonable probability" standard which applies here. So the jury should decide if the withheld information probably would have made a difference.

Now, turning to the County's cross-motion for summary judgment seeking dismissal of the Monell claim, the County argues that the claim is barred by the Eleventh Amendment, that the D.A. is not a policy-maker for the County, and that even if the County could be liable under Monell, plaintiff has not submitted evidence to suggest that the D.A. had an unconstitutional Brady policy. The County also argues that the plaintiff did not sustain a deprivation of his constitutional rights, but much of that argument responds to plaintiff's assertion that he is entitled to summary judgment on the individual Brady issues of nondisclosure, favorability and materiality which I just addressed.

The only additional argument the County raises is that plaintiff's Brady rights were not violated, because plaintiff received other exculpatory and impeachment evidence from the D.A. But just because plaintiff receives some exculpatory and impeachment evidence does not mean that the D.A.'s failure to

provide the evidence at issue in this case does not constitute a Brady violation.

So let me now turn to the Eleventh Amendment argument.

The County argues that prosecutors, when deciding whether evidence should be disclosed pursuant to Brady, are acting on behalf of the State, and thus entitled to the State's Eleventh Amendment immunity.

While it's true that individual prosecutors are entitled to immunity for their decisions related to Brady disclosures -- see Van deKamp, 555 U.S. 335, at 344 -- this immunity does not extend to municipalities; here, the County. See Owen v. City of Independence, 445 U.S. 622, 657, where the Supreme Court said that municipalities have no immunity from damages for liability flowing from their constitutional violations. See Askins v. Doe, 727 F.3d 248, at 255, where the municipality was not immune, even though the officer was.

So I reject the argument for Eleventh Amendment immunity.

The County next argues that it's entitled to summary judgment because the D.A. is not its policy-maker. This argument opens up an inquiry into a series of cases from the circuit that have tried to flesh out when and in what circumstances the County is liable for the actions of a State prosecutor.

In Myers v. County of Orange, 157 F.3d 66, at 77, the

Court held that a D.A. policy that directed the police and County A.D.A.s to engage in investigative procedures that violated plaintiff's "equal protection" rights by refusing to accept criminal cross-complaints gave rise to municipal liability against the County. The Court held that the County was liable for the D.A.'s managerial decision to implement a cross-complaint policy, because it reflected the D.A.'s long practice of ignoring evidence of police misconduct and sanctioning and covering up wrongdoing, and a D.A.'s decision not to supervise or train A.D.A.s on Brady and perjury issues, all of which would result in County liability. That's Myers at 77.

The Court in that case outlined the law in the circuit. It explained that an inquiry into whether governmental officials are final policy-makers for the local government in a particular area involves an inquiry into the definition of the official's functions under relevant state law. Under New York law, D.A.s and A.D.A.s are presumed to be local county officers, not state officers. That's Myers at 76. The Court went on to note at the same page, however, that New York courts recognize a narrow exception to this general rule when a prosecutor makes individual determinations about whether to prosecute violations of the state Penal Law. The Court continued at Page 76, "Although a county cannot be held liable for an A.D.A.'s improper filing of an indictment" -- see Myers

v. Hennessy, 853 F.2d 73, at 77 (2d Cir. 1988) -- a county can be liable based upon its, quote, "long history of negligent disciplinary practices regarding law enforcement personnel which gave rise to the individual defendant's conduct in promoting the malicious prosecution of plaintiffs." Unquote. Gentile v. County of Suffolk, 926 F.2d 142, at 152, Note 5 (2d Cir. 1991).

In Walker v. City of New York, 974 F.2d 293 (2d Cir. 1992), where the, quote, "prosecutors covered up exculpatory evidence and committed perjury in order to ensure the defendant's conviction," unquote, id. at 294, the circuit held that a county could be liable for the, quote, "District Attorney's management of the office; in particular, the decision not to supervise or train A.D.A.s on Brady and perjury issues." Unquote. Id. at 301. The Court in Walker noted that Baez was, quote, "confined . . . to challenges to specific decisions of the District Attorney to prosecute," unquote, and held, quote, "Where a District Attorney acts as the manager of the District Attorney's Office, the District Attorney acts as a county policy-maker." Id. at 301. Again, that's all from Myers at Page 76.

The County argues that under Walker, plaintiff must advance a "failure to train" theory to bring a Monell claim, and because I previously dismissed that claim, plaintiff's remaining claim must be dismissed. Plaintiff disagrees with

the County's narrow reading of Walker.

I find plaintiff's claim that the D.A. managed his office with an unconstitutional Brady policy that failed to require disclosure of evidence unless it was truly exculpatory, constitutes an allegation that fits within the realm of Walker and Myers. I see no reason why a policy of not training on Brady should subject a county to liability, but a policy to apply Brady too narrowly would not. Indeed, Myers found county liability for a long-standing practice of covering up police misconduct. A long-standing practice of construing Brady too narrowly seems like the same sort of thing.

Accordingly, I find the County may be liable for the D.A.'s actions. See Ramos v. City of New York, 285 A.D.2d 274, at 303 (App. Div. 2001), where the Court held that when prosecutors conceal Brady material pursuant to policy or custom, liability rests with the county, not the state.

The County cites a series of district court cases in support of its position that the D.A. is not the County policy-maker, but those cases are distinguishable. Almost all of them involve complaints against individual prosecutorial decisions of the D.A. which, as previously explained, are not at issue here. See Doe v. Green, 593 F.Supp.2d 532, at 534 (W.D.N.Y. 2009), where the county was not liable for the prosecutorial acts of the state which there involved conduct before the grand jury; Michels v. Greenwood Lake Police

Department, 387 F.Supp.2d 361, at 367 (S.D.N.Y. 2005), where the case was regarding the defendant's handling of plaintiff's individual case and no policy or custom was identified. The Court there did suggest the D.A. policies can never be county policies, but it didn't grapple with Walker or Myers. See McLaurin v. New Rochelle Police Officers, 368 F.Supp.2d 289 (S.D.N.Y. 2005), where there was no "malicious prosecution" claim against the county because the county was not liable for individual prosecutorial decisions by the D.A. Another case cited by the County, Miller v. County of Nassau, 467 F.Supp.2d 308 (E.D.N.Y. 2006), is arguably a closer case, because there, plaintiff had challenged an alleged policy of the D.A.'s Office regarding executing plea bargains, not just an individual prosecutorial decision.

But as I read the Miller decision, the Court based its holding on the observation that, quote, "plea bargaining is intertwined with prosecutorial decisions regarding prosecution and trial," unquote, and that plea bargaining is, quote, "not related to the District Attorney's management of the office, and has no relation to the training of Assistant District Attorneys or police investigative policies." Unquote. That's Miller at 316.

By contrast, plaintiff in this case alleges that the D.A. managed the office with an unconstitutional Brady disclosure policy. For what it's worth, a policy regarding

Brady disclosure seems slightly more attenuated from the actual prosecution of an individual than a policy regarding plea agreements.

So I do not feel compelled to follow the Miller decision. And in any event, I simply disagree with Miller because I don't see why a policy that affects all plea bargaining should be treated like an individual decision whether to prosecute or not. The former sounds like management or administration to me. So again, with all due respect to my counterpart in the Miller case, I would have come out the other way in that case.

The County then argues that even if the County could be liable for the D.A.'s action, as I have just found, plaintiff has not introduced evidence to suggest there was a policy or custom of the District Attorney of interpreting Brady in an unconstitutional manner. I disagree and find that plaintiff has submitted evidence to suggest that the D.A. had a policy that subjected Brady; at least there is a factual dispute on the subject.

The County first argues that the, quote, "standard response form" unquote or template language is not enough to establish a policy or custom. But plaintiff has introduced testimony from Grady and from William O'Neill that that language was, in fact, the D.A.'s Office's response to Brady requests, and this evidence seems to at least raise a question

of fact as to whether or not the office had an unconstitutional Brady policy. In addition, plaintiff has introduced evidence that this language was used in other cases, and that Brady material was not disclosed in other cases, which gives rise to a plausible policy.

Further, plaintiff has introduced evidence that several A.D.A.s articulated in court the D.A.'s view of its Brady obligations as not extending to merely favorable evidence. There are other examples of Brady requirements being properly articulated, but (a) the question isn't so much the articulation as the practice, so proper articulation could still exist with an improper practice, and, of course, vice versa, (b) the articulation is only evidence of the practice, it's not the practice itself, and (c) the existence of proper and improper articulations demonstrate a fact question. There is some evidence of an unduly narrow reading of Brady and some evidence suggesting the contrary. It's a classic factual dispute.

I also reject the County's arguments that because others, such as public defenders and judges used template language with respect to Brady means that the D.A.'s policy did not violate Brady. This argument seems irrelevant to whether or not the D.A. had an unconstitutional policy, especially where the policy is not limited to the specific language in the template, but where plaintiff's argument is that those forms

reflect the existence of a policy. Further, the public defender and the courts that used the language, quote, "tend to exculpate," unquote, also added, quote, "or is otherwise favorable," unquote, language the D.A.'s Office usually did not use, at least on occasion argued against, and still may think is wrong. At least an argument could be made based on the Grady and O'Neill depositions.

Let me finally address the supplemental authority that the parties briefed for me, which, on the whole, does not alter my analysis. They brought to my attention Matusick v. Erie County Water Authority, 759 F.3d 51, amended and superseded by 757 F.3d 31, and Jones v. City of New York, 988 F.Supp.2d 305 (E.D.N.Y. 2013).

Matusick involved a "workplace discrimination" claim. The circuit held that collateral estoppel applied, and that the jury was precluded from finding that Matusick had not actually engaged in misconduct that had been charged against him in a Section 75 hearing. That's Matusick at 49. It also upheld plaintiff's Monell claim, finding that plaintiff had alleged that defendant's actions were sufficiently widespread and persistent to support a finding that they constituted a custom, policy or usage of which supervisors must have been aware. That's Matusick at 62.

With respect to collateral estoppel, the case doesn't set forth any new law, or at least any new law that affects my

decisions. It focuses on whether the issues are identical, but doesn't identify what effect different burdens of proof have on this inquiry, nor does it address the "full and fair opportunity to litigate" issue.

As for Monell, Matusick re-affirmed that isolated acts can give rise to Monell liability if done pursuant to municipal policy or sufficiently widespread and persistent to support a finding that they constitute a custom, policy or usage of which supervisors must have been aware. The decision arguably helps plaintiff, because it re-affirms that isolated acts can be the basis for Monell liability if certain conditions are met. And plaintiff seems to be arguing that the D.A.'s policy regarding Brady resulted in isolated acts that violated his rights.

The County attempts to distinguish Matusick on the ground that there is no evidence in the record to establish the presence of frequent and severe Brady violations, but I find the record shows issues of fact with respect to whether the D.A. had a widespread policy or practice of only disclosing Brady material when exculpatory as opposed to just favorable, such that municipal liability could attach.

Turning to the Jones decision, in that case, the Court granted a motion to dismiss because plaintiff had failed to plead facts plausibly alleging that the D.A. was on notice of the need to train A.D.A.s regarding Brady, essentially applying the Supreme Court's decision in Connick v. Thompson, 131 S.Ct.

1350. Plaintiff cites this case for specific language from Judge Weinstein, which plaintiff concedes is dicta, to the effect that in Judge Weinstein's opinion, sovereign immunity should shield the city from liability for the D.A.'s actions, but Judge Weinstein acknowledged that his view was contrary to circuit precedent. In other words, plaintiff argues that Judge Weinstein reads circuit precedent to suggest that the County can be liable for the D.A.'s actions.

Of course, Judge Weinstein, although a well respected judge, is not on the Second Circuit, and his reading of circuit precedent is not precedential, but I consider it, nonetheless. And even he recognized that under Second Circuit and Supreme Court precedent, the county or, in his case, the city, is the proper municipal party in interest in a Monell claim, based on the policies or customs of the D.A. That's Jones at 316.

More persuasive is a case from the Ninth Circuit, Goldstein v. City of Long Beach, 715 F.3d 750, at 751 to 53, which Judge Weinstein cites in Jones at Page 317, where the Court found that "The D.A. represents the county when establishing administrative policies and training related to the general operation of the District Attorney's Office, including the establishment of an index containing information regarding the use of jailhouse informants." The Court in Goldstein explains that it's clear that the District Attorney acts on behalf of the state when conducting prosecutions, and

local administrative policies are distinct from the prosecutorial act. That's Goldstein at 759.

Plaintiff's claim here is similar to the allegations in Goldstein that the D.A. had a policy regarding its obligations under Brady, and that this policy was unconstitutional. Just because the policy was allegedly an affirmative one which --

I'll try again.

Just because the policy was allegedly an affirmative one with which the D.A. himself agreed or at least which the D.A. himself ratified, rather than one inferred from the failure to train or supervise or discipline, should not, it seems to me, make a difference. One key fact in Goldstein, moreover, was that California categorized District Attorneys as county officials. That's Goldstein at 759. Likewise, as the Second Circuit observed in Myers, D.A.s and A.D.A.s are generally presumed to be local county officers, not state officers under New York law. That's Myers, 157 F.3d at 76, quoting New York Public Officers Law Section 2 and New York County Law Section 53.1.

So Goldstein, although not binding on this Court, suggests that the plaintiff's Monell claim should survive summary judgment. Of course, whether the plaintiff can prove that the County's policy led to the alleged violation of plaintiff's Brady rights is a separate question, as is whether

the disclosure of the information would probably have made a difference. But at present, I find that fact issues exist as to whether the County is liable for the D.A.'s policy of failing to disclose Brady material unless the material was exculpatory rather than simply favorable.

So does plaintiff want to make any argument as to why the County should not be entitled to summary judgment with respect to the "alleyway witness" statement on my theory that the nondisclosure of the statement couldn't be the result of the unconstitutional Brady policy?

MR. MacDONALD: No, your Honor.

THE COURT: All right. Then here's where we are.

The plaintiff's motion is granted in part and denied in part. It's granted on the issue that the Dobler Report and Holland Tapes were not disclosed. And it's granted on the issue that the Dobler Report, Holland Tapes and neighbor statements were favorable to plaintiff. It's otherwise denied.

And the defendants' cross-motion for summary judgment is granted in part and denied in part. It's granted dismissing plaintiff's claim against O'Neill and the claims for punitive damages. And it's granted dismissing claims arising from failure to disclose the "alleyway witness" statement. And it's otherwise denied.

The Clerk of Court should terminate Mr. O'Neill as a defendant, and close Motions 146 and 156.

Now, we should discuss trial date or settlement.

Can I see you folks at the sidebar off the record?

(Discussion off the record at the sidebar)

THE COURT: All right. We've had a discussion off the record.

I think it would be in everyone's interest to set a schedule for trial that built in some time to see if there is any possibility of resolving the case, which, since it involves a governmental entity, is going to be a cumbersome process.

So let me first ask the parties how long they think the case would take to try, soup to nuts.

MR. MacDONALD: I think the case would take about seven or eight trial days, so a week and a half or so.

THE COURT: Does that sound right to you Mr. Burke?

MR. P.T. BURKE: It does, Judge, depending upon evidentiary rulings.

THE COURT: So I'll put aside two weeks. The question is when.

MR. P.T. BURKE: Before you go digging too far, can I -- my personal schedule -- and I have never brought these kinds of things up to the Court until I reached a certain age.

THE COURT: You know me. I don't like to ruin people's personal lives or their work lives.

MR. P.T. BURKE: My wife and I had planned to take off from about the last week in January to the first week in March;

in other words, the entire month of February.

THE COURT: Nice.

MR. P.T. BURKE: Well, when you get to be my age, Judge, you can do these kinds of things, I hope.

THE COURT: God bless you.

I hope.

MR. P.T. BURKE: Well, I'm sure --

THE COURT: Somehow, I never have figured out how -- you know, like Judge Brieant used to take the whole month of August off, and I was really looking forward to that when I became a judge, and I haven't been able to do it once. I'm happy if I get two weeks. But he was much faster than I am. Maybe I'll catch up.

All right. So you're gone in February. Right now, I have trials in January. However, one is the week of 5th and one is the week of the 26th. So we could squeeze this in the weeks of January 12th and the 19th.

MR. MacDONALD: Actually, I was just speaking to one of my colleagues, and we were going to propose January 12th or the 13th, knowing that the 19th is a holiday, so there would be a break there.

THE COURT: Right.

MR. MacDONALD: I have one issue with a witness, one witness's availability. That would have to be in that second week. But I think we would go into that second week, and I may

not need to call that witness.

THE COURT: Well, I'm always flexible about taking witnesses out of order --

MR. MacDONALD: Thank you.

THE COURT: -- if, you know, people have vacations or whatever planned.

Does that work for defense counsel?

MR. P.T. BURKE: We'll have to make it work if the Court orders it.

MR. M.K. BURKE: The only concern, your Honor, is that as we approach towards trial; obviously, the pretrial motions and everything else will push us into Christmas.

THE COURT: Well, I think we would have to take care of those in December. But that would still give you a good two months to try to resolve the case.

MR. P.T. BURKE: We should be able to get that done.

THE COURT: All right. So let's work back from January 12th. And if I'm lucky, one of my other two cases will go away so I don't have three back to back. But if I do, so be it.

Jury selection and trial will be January 12th.

Alice, can we find a date for final pretrial conference the week of the 5th, maybe the Thursday? Because I think the trial we have that week is just going to be three days.

THE DEPUTY CLERK: January 8th, 2:30.

THE COURT: January 8th, 2:30, will be the final pretrial conference. Then working backwards from there and not destroying your holidays, how about motions in limine December 10th, and opposition December 17th. I'll have the joint pretrial order December 3rd, proposed jury instructions and voir dire questions also December 10th, let's say.

MR. MacDONALD: I'm sorry. December 10th for?

THE COURT: Proposed jury instructions and voir dire questions December 10th, motions in limine December 10th, opposition to motions in limine December 17th, joint pretrial order December 23rd, final pretrial conference January 8th at 2:30, jury selection and trial January 12th.

And that leaves you a good two and a half months to try to resolve it.

MR. P.T. BURKE: Judge, what weeks did you pick for the trial?

THE COURT: The weeks of January 12th and 19th.

MR. P.T. BURKE: Okay.

THE COURT: You can go on your vacation free of cares.

MR. P.T. BURKE: Well, please God, the 20th, I think we're planning on leaving.

THE COURT: I'm sorry. What's the day you're leaving?

MR. P.T. BURKE: The 20th.

THE COURT: Oh, you're leaving that early in January.

MR. P.T. BURKE: Yes.

THE COURT: Aha. Well, I don't think we'll be finished by the 20th, especially because the 19th is a holiday.

MR. P.T. BURKE: No. I beg your pardon, your Honor. We're not leaving until the 27th. I'm sorry.

THE COURT: Okay. Then we're good.

MR. P.T. BURKE: Yes.

THE COURT: We've got to be done by the 27th or at least the jury had better have it.

MR. P.T. BURKE: Right.

THE COURT: All right. Good. Why don't you folks send me a joint letter a week from today with respect to whether you think Magistrate Judge, private mediator or court mediator is the best idea, or if you don't like any of those ideas. But I think, as somebody said at the sidebar, there is nothing like a trial date to focus the mind. So now is the time to work this out if it can be worked out.

MR. P.T. BURKE: Right.

THE COURT: All right. Anything else we should do now?

MR. M.K. BURKE: Your Honor, do we want to set for now -- we do, I believe, intend to move to re-argue -- a schedule as to that or do you want me to send it in a letter a week from now?

THE COURT: Well, why don't you talk to Mr. MacDonald

and Mr. Firsenbaum and see if you can agree on a schedule. I'd like it to be pretty tight.

Do you want to tell me, without committing yourself, what are the issues that you think I blew. Or let me withdraw that. What are the ones that you think I blew and that you're going to move to reconsider on, because maybe you think I blew more than one.

MR. M.K. BURKE: The first issue, your Honor, is that nowhere in the complaint, the amended complaint, does it have an allegation as to managerial role of the D.A.'s Office. There are different theories of liability under Monell, as we all know. There is the management and supervision. There is the failure to train. They initially brought a "failure to train claim." There was language in the initial complaint that had touched on a managerial role. That was taken out of the amended complaint. So there is no complaint -- there is nothing in the allegations as to managerial role. It was custom and policy, the third Monell theory of liability, not the failure on the part of Grady who was no longer a defendant, in his managerial role.

THE COURT: I don't know. He's the one who sets the policies. I mean, my discussion --

Make your motion. I'm not suggesting you shouldn't. If I screwed up, I want to fix it.

But when I was discussing the distinction between

managerial -- when I was discussing managerial role, I was discussing it in the context of the distinction between managerial and prosecutorial, the former meaning overall policies of the office, the latter meaning individual case decisions.

So whether you call it "setting policy" or "implementing a policy or practice" or "managing the office according to a policy or practice," I still think it meets Monell. But as I say, you'll get the transcript, you'll decide whether what I said was right or wrong. Okay?

Was there another issue?

MR. M.K. BURKE: I need to --

THE COURT: When you get the transcript, you'll find out.

MR. M.K. BURKE: I'll find out. That's correct.

THE COURT: All right. So I hope you'll have the transcript in time to put that in the letter next week, as well. Hopefully, you can agree upon a scheduling order, but I'm not going to want 25 pages. Let's keep the briefs to 15. And actually, the sooner I get them the better, because the more time that goes by, in my old age, I start to lose the details. But they're really in the front of my mind now. So try to put that in the letter, as well. But I hope you'll still be talking settlement while that's pending.

All right. Anything else?

MR. BOZELLA: Your Honor --

THE COURT: Better talk to your lawyer. Don't talk to me.

(Pause)

MR. MacDONALD: My client simply wanted to express his gratitude to the Court for the time and the willingness to present the decision today in person. He appreciates that, as I'm sure I speak for all counsel, for the Court's energy and time on this.

THE COURT: That's why they're paying me the big bucks.

ALL COUNSEL: Thank you, your Honor.

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